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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE FACTS DOES NOT GIVE THE COURT A CORRECT VIEW OF THIS CASE, AND AT SOME PAINS WE WISH TO PRESENT THE FACTS, AS WE VIEW THEM, BEFORE THE COURT.

The case was brought upon two theories, — first, negligence in reference to the condition of the track, road-bed and right-of-way caused the initial derailment and not the small rock placed thereon by the negro child; second, defendant had equipped its engines with an appliance known as a watchman, which applied the air brake whenever the front trucks left the track and dropped down as far as 2½ inches, and which should have stopped the train before the final derailment and wreck.

There was abundant evidence that the track was out of condition, that the ties were rotten, that they were insufficiently spiked at both the place where the original derailment occurred and where the second derailment occurred. We refer the court to the photographs on pages 103, 107, 108 and to the testimony of Lunsford on pages 56, 57 and 58 of the record.

That the evidence supported the theory that the watchman should have applied the air, and did not apply it, and that had it functioned the train would have stopped in two hundred yards after the initial derailment (whereas the train ran seven-tenths of a mile) is shown by the testimony of Goree, who testified on page 48 that if the air had been applied at the initial derailment the train would have stopped in fifteen car lengths of forty feet to the car, which would make six hundred feet or two hundred yards; by the testimony of Lunsford that beginning with the initial point of derailment throughout the entire seven-tenths of a mile, the wheels of the front trucks dropped down from the top of the rail to the cross-ties where marks were made by both of the wheels on the ties (Lunsford, pages 55, 56 and 57); by the testimony of Holcombe to the effect that the rail was 6¾ inches high (record page 63) that the mark of the flanges of the front wheels began at the point of derailment opposite the negro church (record page 62) and that the mark of the front wheels on both sides was on the cross-ties from the point of initial derailment to the final turnover (showing as a physical fact that the trucks had dropped 6¾ inches and allowing one inch for the flange had dropped a net distance of 5¾ inches).

It was shown by the fireman Goree and by all the train crew, Davis and Dowdle, that no brake was put on at the initial derailment or during the seven-tenths of a mile when the engine was running on the track with the front wheels off (see Davis, conductor, page 87, and Dowdle, baggage man, page 89 of the record). Goree, the fireman, said at the final turnover, after the engine had run with the trucks off for seven-

tenths of a mile, the engineer, when the entire engine got off the rails and headed in on the sidetrack, which was the time of the final turnover, put on his air brakes (record page 47). Neither the engineer nor fireman had discovered, or could discover, the first derailment of the trucks, as the engine was running apparently normally.

There was evidence that the rock or sandstone put on the track by the little negro boy did not derail the engine. The witness Holcombe, on page 62, who got to the scene right after the wreck, testified that there was just a little pile of sand rock crushed on the rail, "no great sight, a small amount, I think there wasn't much more than two handfuls, I don't think there was."

The witness Goree, who was the fireman, testified on page 49:

> "I have run over one as big as a hen's egg when we were working local. The engine crushes the rock. I don't think I have ever known of a rock throwing the engine off before in my experience. I couldn't estimate how many times I have ever run over stones or rocks or sandstone; I guess hundreds of times, because I have been here twenty-six years. When we want to stop an engine, we have a sand box on our engine. You apply sand if you want to; it isn't essential, but you can do it. That does not make the engine run off the track; it tends to stop it because of the friction."

Further on at the bottom of page 49, this witness testified:

> "If I were running an engine along, and saw a small rock on the track, I would not stop for it. The engine usually crushes it, or just brushes it off, and sometimes you don't ever know it. If a rock was a foot high the pilot would knock it off."

The witness H. A. Cox testified (see record page 70) to the effect that he had picked a sand rock up near the place

of this wreck; that Holcombe, the deputy sheriff, was along when he found the rock; that he had been a fireman for years; that he never had anything like that to derail trains; that he had run over rocks many times with trains; that when a rock is struck by an engine weighing 140 or 160 tons it would knock it off but if it hit it it would crush it, "That rock crushed up is almost the same as common sand. You sand the track to keep the engine from slipping when starting the train." (Record page 71.)

The Court of Appeals of Georgia in its opinion held that there was evidence to support the verdict on both counts of the petition, that is, on the defective track and road-bed and on the failure of the little watchman to function, the language of the Court of Appeals on page 163 being as follows:

> "There were two theories in the case, one of negligence and the other based on the safety-appliance laws, and the judge properly separated these theories and instructed the jury as to the same. None of the special assignments of error show any error as against the defendant. There was evidence tending to substantiate the plaintiff's case on both theories."

THE EVIDENCE WITH MATHEMATICAL CERTAINTY SHOWED THE CONDITIONS WERE PRESENT WHICH WOULD NECESSARILY HAVE MADE THE LITTLE WATCHMAN FUNCTION WHEN THE FRONT TRUCKS LEFT THE TRACK.

It will be borne in mind that the little watchman simply applies the air brakes on the train by tripping a trigger which opens a valve when the front trucks leave the track. There is no difference between the way the watchman applies the air and the way the engineer applies it from his seat in the cab.

We have already quoted the evidence of Holcombe and Lunsford to the effect that beginning at the point of derail-

ment the flanges of the front wheels hit the same cross-tie in numbers of instances between the point of initial derailment and the point of final derailment. The front wheels on both sides could not have hit the same tie without having dropped 6¾ inches; the height of the rail. The first mark of the flanges on the ties was on the first three ties after the derailment, then on the seventh tie, then on the eighth tie, then on the ninth tie, the tenth, the eleventh, then on six ties from twelve to eighteen on both sides, and so on all the distance (record pages 62, 63). Not only this, but the mark of the left flange inside the rail at one place was eighteen inches from the rail (record page 63). This not only showed that the wheels had dropped the height of the rail but also that they had moved to one side eighteen inches. Either proposition would have set the brake because the frame was only five inches high, and even if the trigger had not been exactly in the middle of the frame (as it should have been), to drop 6¾ inches would have applied it, and as the frame was only eighteen inches wide a movement out laterally or to one side of eighteen inches from the rail, supposing the rod to have been somewhere near the middle of the frame, would have easily applied the brake.

The court left very fairly to the jury the question as to whether the conditions were present which should have made the watchman apply. The plaintiff proved those conditions with mathematical certainty. It was admitted by the defendant's master mechanic that with those conditions existing the watchman must have applied. It is true, after testifying on his direct examination that the watchman would have applied under those given conditions, that on the cross examination the master mechanic was somewhat vague, indefinite and evasive in his answers, but the true construction of his testimony was for the jury.

Goff testified on page 77 of the record:

> "Whatever the height of that rail is, when those trucks get off, that wheel would drop to the tie or the ballast, one or the other."

We call attention of the court to the photographs of the watchman in the record on pages 109, 110, 111 and 112. The apparatus is very simple. It merely depends upon the fall of the truck carrying down the frame in which is placed a trigger connecting with the air line. It applies the air exactly like the engineer applies the air from the cab.

Goff testified on pages 80 and 81:

> "As to there being any way to keep it from operating if the framework comes in contact with the trigger, from the construction of the valve, it would appear that it would have to work. It would operate, of course, to set the brakes."

Again Goff testified on direct, on page 81:

> "I don't know the height of the rail, but, supposing the height of the rail and the tie-plate under it is 5½ inches, and the trucks got off the track so as to make a mark on the ties, that truck frame would have to fall off the rail from 3 to 4 inches."

Further on, on page 82, Goff testified:

> "A new flange is one inch long; so that if the rail is 5 inches high, and that wheel gets off the rail, and that point of the flange hits the cross-tie and holds it up, that frame will have dropped 4 inches, the flange being an inch high; you take that inch from the 5 inches of the rail, and your frame would drop 4 inches; taking it for granted that the height of the rail and the tie-plate together is 5 inches, that would make that drop 4 inches."

Further on, on page 82, Goff testified:

> "We give much less play up and down vertically, that is only 5 inches, because if the truck drops, we want that to affect the trigger either way almost instantly if the truck gets off. The man that got it up intended to put it on there to stop the engine, instead of the brakes, in

case of a derailment; in case the first front truck got off. It only applies to the front truck, and the object was to apply the brake on the engine just as soon as the front truck got off."

We say that the foregoing testimony of the defendant's master mechanic Goff fits the exact facts of the instant case. It does not profit us to consider his vague answers on cross examination to the effect that the matter was in an experimental stage and that sometimes the device would set the brakes even when the conditions were not present which called for it. So far from this being in the defendant's favor, it is against the defendant. The general trend of this vague testimony on the part of Goff, as see page 86 of the record, is:

"I might say that we have had some delays to trains on account of this device setting, and that would then involve the necessity of increasing the size of the framework."

—and further on, on page 86:

"We have set them the same thing and had them to set the brakes in emergency on the line of road."

—and further on, on page 86:

"I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road."

There does not seem to have been any complaint by the master mechanic on his cross examination that the brakes did not set in every instance where they should, but that often they would set when they should not. This is to err on the side of safety and does not benefit the defendant.

The petition in this case alleged that the conditions were present which should have set the brake, the petition alleging

on page 9 that the apparatus was designed to apply the brakes whenever the front wheels left the track and that the front wheels did leave the track and that (page 10) "had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over, and the life of the decedent would have been saved." The second count alleged the same thing (page 14).

The plaintiff proved beyond controversy, as see the testimony hereinbefore quoted of Holcombe and Lunsford, that the front trucks were derailed; that the rail was 6¾ inches high; that the flanges of the wheels of the front trucks immediately began to strike the cross-ties, both flanges striking the same tie in numerous instances, which showed that the wheels had dropped the height of the rail; also that there were marks on the ties eighteen inches to the left of the rail, showing the wheels at times moved laterally eighteen inches, and that these marks continued 7/10 of a mile before the engine turned over and killed the engineer. All of these conditions the master mechanic said would have set the watchman. Of course, the plaintiff never contended that the watchman would have applied if the conditions did not exist which would have necessarily applied it. Even though the watchman at times may have functioned when it should not have functioned, still it was agreed on all hands that there were certain conditions that would have required it to function if the watchman had been in working order, and the master mechanic admitted they were the conditions which existed in this case.

THE DEFENDANT NEVER PRETENDED TO EXPLAIN WHY THIS WATCHMAN DID NOT FUNCTION. THE INFERENCE WAS OVERWHELMING THAT THE WATCHMAN WAS OUT OF CONDITION AND DEFENDANT MADE NO EXPLANATION OF ITS CONDITION.

The superintendent Madden showed in his statement, beginning on page 93 and on page 94 thereof (see record) that

he went immediately to the scene of this wreck, arriving the same afternoon, and made an inspection. He tells on pages 95 and 96 of examining the locomotive. He said there was an attachment on the engine known as Wright's little watchman. He did not say one word about the condition that that little watchman was found to be in on this engine. He was strangely silent on that subject. The master mechanic Goff came to the scene of this wreck the same day and took the watchman off and testified as follows on page 82:

> "I did not test this watchman after I took it off; I understand that Mr. Stewart, the superintendent of motive power, had it tested; I don't know it; I know they told me they did test it, that is all I know about that part of it. When I got there, the truck, as I say, was all laying over there; the truck part of it was all disconnected from the watchman part of it, from the trigger part; naturally, it would be. The trigger part of it, and the air pipe to the train line, had been taken off; Mr. Stewart had it taken off. It had been taken off when I got there; he had it taken off for the purpose, I understood, of having it tested."

And yet we have not a word in this record from Stewart, the superintendent of motive power, or anyone else on behalf of the defendant as to what condition this watchman was in. Why talk vaguely about whether the watchman on other occasions had functioned when it should not have functioned, when the defendant's agent had the watchman for a test, undoubtedly made the test, and did not show the court whether it was in condition or out of condition? The conclusion therefore is irresistible that the watchman must have been out of condition.

IN HIS CHARGE TO THE JURY THE JUDGE FAIRLY SUBMITTED THE DEFENDANT'S LIABILITY UNDER BOTH THEORIES, THAT IS, UNDER THE FIRST COUNT TO THE EFFECT THAT THE TRACK AND ROAD-BED WERE OUT OF CONDITION, AND THEN UNDER THE THEORY SET UP IN THE SECOND COUNT THAT THE LOCOMOTIVE APPLIANCE ACT HAD BEEN VIOLATED BY THE FAILURE OF THE LITTLE WATCHMAN TO FUNCTION WHEN IT SHOULD HAVE FUNCTIONED.

The judge told the jury on page 150,—

> " . . . and if the same (watchman) did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case."

Again on pages 150 and 151 the court charged,—

> " . . . and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and the decedent's life would have been saved," etc., then the defendant would have been liable.

In other words, the jury understood fully that the defendant would not be liable unless this was a case in which the watchman should have operated, and that its liability depended upon whether its failure to operate was due to the fact that it was not in proper condition.

AS TO THE DEFENDANT'S CLAIM THAT THIS WATCHMAN WAS BUT AN EXPERIMENT AND SHOULD NOT BE CONSIDERED A PART OF THE ENGINE, WE MAKE THIS REPLY:

Undoubtedly the watchman was a physical part of the engine. The air brake line extended into the engine and this watchman with the trigger which opened the valve was as much a part of the engine as that part of the air brake line which sat in the engineer's cab and which the engineer applied. It was the same thing in principle. It gave the engine a degree of safety which an engine which did not have that appliance did not possess. The degree of safety which an engine possesses depends upon the type of that particular engine, and the type of that particular engine depends upon what the particular railroad desires it to be. The law does not require it to have any particular type of engine, unless the Interstate Commerce Commission has investigated and condemned a particular part of an engine which the railway puts on it and substituted another, and as long as the railway is allowed unmolested to add any particular parts to an engine or to use any particular type of engine, that particular part and that particular type of engine must be in good condition and must function properly.

We say that none of the decisions have recognized the contention that when an engine is out on the road running and hauling passengers, that any part of that engine placed thereon by the defendant for use in actual transportation can be called an experiment. Experiments should be conducted otherwise.

Again we refer to the master mechanic Goff who testified on page 78 of the record that the watchman had been used by the defendant five, six or seven years; that on this particular division it was used on the majority of engines; that this particular engine was equipped with it; that the company had been putting this appliance on the engines gradually; that all the passenger engines on this division were equipped with this

appliance; that the railroad at one time quit using them but then started to putting them on again and had been increasing them ever since. (See Goff's redirect examination, pages 86 and 87.)

Certainly a mere conclusion of a witness that an appliance was an experiment in the face of such specific testimony as this would have raised a jury question and would have required the jury to find that this appliance was no experiment but had become a regular operating part of this engine.

An experiment should be used only on one engine. An experiment would hardly be used five to seven years. An experiment would hardly be used on every engine every day for at least five years in passenger traffic which was carrying on defendant's business. But as the defendant had made this claim that this appliance was an experiment, the judge submitted that issue to the jury as a question of fact, and the intimation of the Georgia Court of Appeals was that this was certainly not error against the defendant, implying that it was error in favor of the defendant. The judge in his charge gave the jury the benefit of the defendant's answer setting up this experiment contention, in the following language:

> "The defendant contends that the device known as Wright's Little Watchman is really in an experimental state, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the de-

cedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly."

ARGUMENT IN REPLY TO THE PETITIONER'S LEGAL CONTENTIONS IN ITS BRIEF.

(1)

DEFENDANT CONTENDS APPARENTLY THAT NOTHING CAN BE A PART OR APPURTENANCE OF AN ENGINE WHICH THE DEFENDANT IS REQUIRED TO KEEP IN PROPER AND FUNCTIONING CONDITION UNLESS IT IS SPECIFIED BY AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

We deny this. The Safety Appliance Act as to locomotives is found in Section 23 of the Safety Appliance Act as finally amended by the Act of 1915, as see page 79 United States Code Annotated, Title 45, Section 23. This Act provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive, unless such locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," etc.

That this little watchman is a part and appurtenance of this engine is too clear to require argument. As before stated, we refer the court to the photographs which appear in the record. The appurtenance is on the engine. It is in the very front part of the engine, approximately forty feet ahead of where the engineer sits. It is as much a part of the engine as the driving wheels or the pilot or the electric headlight or the air brake which the engineer puts on from his cab. Indeed it is the air brake, and instead of operating by the engineer's hand it operates by a fall of the trucks which strike a stem.

The law does not undertake to tell the railroad what it must put on the engine (unless the Interstate Commerce Commission has previously acted as to some part of the engine which it has condemned or arbitrarily orders another part) but leaves that to the railway company.

The first portion of Section 23 lays down the duty of the railway, as to every part and appurtenance of the locomotive which as a matter of fact is on the locomotive, to keep it in proper condition.

Then follows a further provision making it unlawful to use a locomotive "unless said locomotive, its boiler, tender, and all parts and appurtenances" are inspected as provided in Sections 28, 29, 30 and 32. This does not mean that the railway has lost its right to equip the locomotive with its own appliances. It must be inspected and parts of it may be condemned, but as long as it is not condemned, these parts may be used.

Sections 28, 29, 30 and 32 of the Boiler Inspection Act providing for inspection merely give the Commission power to make rules for the inspection of locomotive boilers; that before these rules are changed they must be approved by the Interstate Commerce Commission; that the Chief Inspector shall make all needful rules; the duties of district inspectors are provided for, requiring a personal inspection of all locomotives, and the inspectors are given the same power with respect to all parts and appurtenances of the locomotive that they previously had as to the boiler.

Section 31 requires the Chief Inspector to make an annual report, and Section 32 requires reports as to accidents.

There is nothing whatever in these provisions as to the power to make inspections which in the remotest way relates to such an appurtenance as this little watchman.

A penalty is placed upon a carrier which uses a locomotive without this inspection or in violation of this law.

The defendant in this case has not in any way attempted to show that it complied with any order of the Interstate Commerce Commission as to this watchman. Indeed its claim is that it was a superadded part on the engine put on for safety by the defendant itself without its being required by law to do it; whereupon we say that putting the part on the engine made it then and there a part and appurtenance of the engine. Until the Interstate Commerce Commission should have acted on this watchman, either forbidding it or making a substitute for it, this watchman remained as a part and appurtenance of the engine placed there by the defendant and for which the defendant is responsible.

The United States Supreme Court in Illinois Central v. Williams, 242 U. S. 462, had the Safety Appliance Act before it. That Act required that freight cars having ladders should be equipped with secure hand holds or grab irons on the roofs at the top of such ladders. This requirement was set forth in Section 2 of the congressional enactment. In Section 3 it was provided that within six months after the passage of the Act the Interstate Commerce Commission should designate the number, dimensions, location and manner of application of the appliances provided for by Section 2 of the Act, and it was further provided that the Commission had full power to postpone compliance by any carrier with the provisions of this section. The railway contended (very much as is contended here) that until the Commission fixed all the dimensions for the ladders and the hand holds and their exact locations, the statute did not of its own terms require secure and safe hand holds above the top of the car but rather depended upon some action by the Commission. This contention was rejected by the Supreme Court which held that the language in Section 2 that all cars used by any carrier requiring ladders should be equipped with such ladders and also with secure hand holds or grab irons on their roofs, was an absolute requirement effective at the time the Act went into operation, and that even though the Commission could make specifications exactly as to where these ladders should be and their exact dimensions,—that still the Act by its own terms

required that there should be a secure hand hold on the top of the roof and that no amount of authority given the Commission to postpone the operation of these particular specifications could affect the primary requirement of the Act. The Supreme Court used the following language:

> "The claim of the defendant railway companies with respect to these two sections is built up wholly upon the assertion, it cannot properly be called argument, that because, in the part of section 3 just quoted, reference is made to section 2 for a description of the safety appliances to be standardized, therefore the whole of section 2 must be treated as so incorporated into section 3 as to be comprehended within the expression of the proviso giving power to the Interstate Commerce Commission to extend the period within which any common carrier 'shall comply with the provisions of this (the 3d) section,' etc., and that section 2 was therefore suspended until July 1st, 1916, by the Commission's order of March 13, 1911.
>
> "That this strained and artificial construction of the section cannot be allowed may be made clear by a brief consideration of the terms and purposes of the two sections of the act.
>
> "The congressional purpose in enacting section 2 of the act is very plain. At the time the act was passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure hand holds or grab irons on their roofs at the tops of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative duty, of making them 'secure,' and to enforce this duty by appropriately severe penalties. Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612."

And further on the court also used the following language:

> "To change these safety appliances on all the cars in the country from what they were as contemplated by section 2,—'secure,' but differing, 'in number, dimensions, location and manner of application,'—to what they must be when standardized to meet the requirements provided for in section 3, was regarded by Congress as a work so great and so expensive that it wisely committed to the informed discretion of the Interstate Commerce Commission the power and duty of determining the length of time which the carriers should be allowed in which to accomplish it. To give this discretion to the Commission is the function, and the only function, of the proviso of section 3, and the claim that, by construction, power may be found in it to suspend section 2, is too forced and unnatural to be seriously considered.
>
> "This reading of the two sections makes them stand together as an expression of a consistent congressional purpose 'to promote the safety of employees and travelers on railroads' on and after July 1st, 1911, by requiring that the safety appliances described in section 2 of the act shall be secure and efficient from that date, and by requiring, as section 3 provides, that these appliances shall be brought as speedily as may be to a uniform standard of location, size, and usefulness, to be prescribed by the Interstate Commerce Commission."

It will be noted that in this Williams case the law made no specifications but required only safe and secure hand holds. It was held this was sufficiently definite legislation.

So in our case Section 23 requires whatever becomes a part and appurtenance of this locomotive to be in proper condition. This is the basic law. As long as the Commission allows these appurtenances to be on the engine they must function. Perhaps the Commission could require them to be taken off or could require something to be substituted in their stead, but until the Commission so acts, this locomotive has this

watchman as an appurtenance which must be in proper condition and function.

In the case of Western & Atlantic R. R. v. Meister, 37 Ga. App. 570, this same contention was made that the Interstate Commerce Commission must have made a rule or acted before there could be any duty, and the question in this Meister case was as to hand brakes, which the statute required to be "efficient," and on page 575 of 37 Ga. App. in said case the court said:

> "We cannot agree that it was necessary for the plaintiff to allege and prove the violation of any rule of the interstate commerce commission. The authority granted to that tribunal under the provisions above quoted conferred no power to dispense with a compliance with the statute as to the equipment of cars with efficient hand brakes. Upon this point it was sufficient to allege and prove that the particular car was not so equipped. The plaintiff's right to recover depended upon proof of a violation of the statute, and not of a rule of the interstate commerce commission. While it is the duty of the interstate commerce commission not only to provide for standardization, but also to enforce the provisions of the act, a compliance with its orders would not necessarily be a compliance with the statute. The observance of reasonable regulations promulgated by that authority would in every case be the minimum of what the railroad should do within the law, but might not be the maximum. The commission could not require less than 'efficient hand brakes.'"

Opposing counsel quote the case of B. & O. R. R. v. Groeger, 266 U. S. 521. In reply we beg to state that this case is very strongly in our favor. In this Groeger case the decedent was killed by the explosion of a locomotive boiler. The plaintiff contended the defendant railway was negligent in failing to equip the engine with a fusible plug in the crown sheet. It will be observed that this complaint of negligence

or inefficiency went entirely to the construction of the engine. It was not claimed that there was a fusible plug in the crown sheet which was in bad order or which would not function. It was simply claimed that the engine should belong to that type which had a fusible plug in the crown sheet. The objection went entirely to the construction of the whole engine in that it omitted a part which was claimed to be necessary for its safety.

We call attention here to the fact that Section 23 of the Safety Appliance Act requires the defendant to have in proper condition all the parts and appurtenances of the engine. A part and appurtenance which is not on the engine need not be in proper condition. There was no fusible plug in the crown sheet in the Groeger case. The defendant had decided it did not want that type of engine.

Right here we refer to the automatic bell ringer case of Hines vs. Smith, 275 Fed. 766. Had there been no automatic bell ringer it would not have been a part and appurtenance of the engine and therefore nothing need be said about it or could be said about it, but having been put on the engine and employees having been led to work in connection with it and rely upon it, it must be in proper condition and must operate.

Resuming consideration of the Groeger case, we call attention to the language of the Court which sustains our position precisely. The judge below had submitted to the jury in the Groeger case the question of whether there had to be a fusible plug in the crown sheet. To compare that with the case at bar, we will suppose the engine in question had not been equipped with Wright's Little Watchman. If the plaintiff had alleged that the defendant should have equipped the engine with Wright's Little Watchman, then the same question exactly would have arisen that did arise in the Groeger case. The railroad could reply: "We did not desire that type of engine. We did not have that on the engine as a part and appurtenance thereof. You cannot complain of our

being negligent as to something which never has been a part of the architecture and construction of that engine. The law does not require it to be on or off the engine." Such a reply would have been justified by the Groeger case because the Groeger case went solely on the question that there was no fusible plug employed by defendant in the crown sheet and that therefore it had not become a part and appurtenance of the engine.

Judge Butler, in writing the opinion in the Groeger case, used this language in reference to the Safety Appliance Act:

> "The jury was by the charge (the charge submitted to the jury was that the defendant should have put a fusible plug in its crown sheet under the safety appliance law) authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. There is nothing in the act or in any rule, regulation or order authorized by it, which specifies the use of fusible plugs."

Further on, the court said:

> "It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition."

Another case which the defendant quotes is United States v. Southern Railway Company, 1 Fed. (2) 487.

This was a mere criminal prosecution under the second provision in Section 23 on page 79 of 45 U. S. C. A. of the Safety Appliance Act. The railroad was prosecuted for failing to comply with the rules and regulations promulgated by the Interstate Commerce Commission as to the condition of each locomotive and was prosecuted for using a locomotive "when the monthly inspections and tests of said locomotive and tender and other parts, as required by said act and said

rules and regulations made pursuant thereto, had not been made by the defendant, and the monthly report of and concerning the inspection of said locomotive and tender and other parts had not been filed, as provided by said act."

The important thing held by the court was that "Each use of a locomotive after time for inspection constituted a separate offense." The company was fined therefore for eleven violations $1100.00, or $100.00 each.

We have never in any way contended that orders by the Interstate Commerce Commission are not valid and also that the use by the defendant of a locomotive after failure to inspect it as required is a penal offense.

This will still leave in force the independent enactment of Congress that every part and appurtenance of the locomotive must be in proper condition.

Petitioner also quotes United States v. B. & O. R. R., 293 U. S. 454. This was a criminal prosecution and merely held that a rule by the Interstate Commerce Commission which required carriers to substitute power operated for hand operated reverse gear, if the latter is found by the Commission to prevent unnecessary peril to life or limb, is within the scope of the Commission's power. We have never denied that the Commission has power to order disuse of many parts of a locomotive which a railroad might use and substitute something else. No such question is raised here, but until the Commission does act, the company remains under a duty to see that all parts on the locomotive or which are put on the engine and which have not been condemned are properly functioning.

(2)

PETITIONER MAKES THE CONTENTION THAT THE USE OF THE WATCHMAN COULD NOT POSSIBLY CAUSE UNNECESSARY PERIL TO LIFE OR LIMB OR IN ANY WAY IMPERIL THE SAFETY OF THE LOCOMOTIVE, BUT ON THE CONTRARY ADDED AN ELEMENT OF SAFETY. PETITIONER MISUNDERSTANDS OUR POSITION IN RESPECT TO THIS CONTENTION.

We respectively answer that the locomotive appliance enactment does not rest upon so narrow a construction. This court has held time and again that these laws are to be liberally construed in favor of life and limb. We say that the inventions of science add an element of safety to the engine which employees and passengers are entitled to as an obligation.

Could it be argued that the air brake on the engine and train operated from the cab by the engineer is a mere added element of safety to that train which need not be kept in proper condition and that it not only does not imperil life and limb but adds to the safety of the employees and passengers? The air brake in the hands of the engineer is exactly like this watchman. Indeed they are identically the same thing.

This little watchman made that particular locomotive a different locomotive from one without it, just as the air brake in the engineer's hand made it a different locomotive from one operated by a hand brake. It made the locomotive a safer locomotive. It could stop more quickly and with less effort. When the front trucks got off, even if the engineer or fireman could not see the disaster, this appliance acted. The degree of safety which that locomotive possessed depended upon whether all of its parts and appliances functioned. The safety of the crew and the passengers was unnecessarily imperiled if that appliance which was put on that engine was out of con-

dition. The crew knew of that appliance and contracted with reference to it. They were just as much imperiled if that appliance failed to function as if any other appliance on the engine failed to function, whether it be the automatic bell ringer, the steam brake on the drivers, the electric headlight, or anything else.

(3)

THE LOCOMOTIVE IS CONSIDERED BY THIS LOCOMOTIVE APPLIANCE STATUTE AS JUST AS SAFE AS ALL THE PARTS AND APPURTENANCES ON IT MAKE IT WHEN THEY FUNCTION PROPERLY, AND THAT DEGREE OF SAFETY IS IMPERILED WHEN THEY FAIL TO FUNCTION. IN THE GENERAL SENSE OF THIS STATUTE, THE ENGINE MUST BE SAFE TO OPERATE IN THE SERVICE TO WHICH IT IS PUT. IN OTHER WORDS, WITH THE APPURTENANCES PLACED BY THE CARRIER ON THE ENGINE, THE DEGREE OF SAFETY WHICH WOULD RESULT IF THOSE APPLIANCES FUNCTIONED PROPERLY MUST BE MAINTAINED.

It is true the train could run without the air brake with a certain degree of safety, but that degree of safety would be much lower than the degree which would exist if the air brake worked. The presence of the air brake elevates the engine to a standard of safety above the hand brake standard of safety. It is a standard established by the defendant itself which it must maintain. This is what this statute means by the language "safe to operate in the service to which the same are put" and the further language that the same may be employed in the active service of the carrier without "unnecessary peril to life or limb."

We say that under this statute safety is a relative term. The error into which opposing counsel falls grows out of failing to maintain this distinction. The engine must be safe to oper-

ate in the service to which it is put in view of the requirement that all of its appurtenances must be in proper condition. What would have been considered safe in the way of mechanical inventions fifty years ago would be considered very dangerous now. Certainly the railway company cannot complain after having erected its own standard of safety. It seems to us to be a far cry for the railway to claim that a rule of this sort would discourage the railway in putting safety appliances upon its engines.

We say, therefore, that defendant's contention that the use of the watchman would not cause unnecessary peril to life or limb is beside the question; that this language is used in connection with the requirement that the locomotive and all its parts and appurtenances must be kept in proper condition and safe to operate in the service to which it is put; that the language is used in connection with the standard of safety fixed by the defendant itself in putting parts and appurtenances on the engine, and the law endeavors to keep up that standard of safety to what it would be if all those parts and appurtenances functioned.

(4)

ANY PART OR APPLIANCE ON THE ENGINE OR TENDER, NO MATTER WHAT OR WHERE IT IS, MUST BE KEPT IN PROPER CONDITION. CASES EXAMINED.

See the case of Lehigh Valley R. Co. v. Beltz, 10 Fed. (2) 74, in which a certiorari was denied by the Supreme Court, as see 270 U. S. 641. This case gives a history of the amendments to the Boiler Inspection Act and on page 75 says that the amendatory act of 1915 declared that the act of 1911 should "apply to and include the entire locomotive and tender and all their parts and appurtenances." The court went ahead to say:

"In the instant case the trial judge was of the opinion

> that the act made it the absolute duty to use only locomotives which are in all respects safe. If an unsafe locomotive should be used and injury resulted, the loss had to fall somewhere and Congress made it fall on the carrier, whether the latter was at fault or not. The acts, in his opinion, made the carrier 'an insurer against all defects of its rolling stock.' He refused to charge that 'the mere breaking of this pin (in the locomotive) does not establish a violation of defendant's duties, under the so-called Boiler Inspection Act, as amended, or establish a cause of action in favor of plaintiff.' He therefore instructed the jury that the only question of fact for them to consider was the question as to the amount of damages."

This charge of the District Court was affirmed by the Court of Appeals in 10 Fed. (2) page 74, and headnote 4 of this case reads as follows:

> "Boiler Inspection Act Feb. 17, 1911, as amended by Act March 4, 1915, imposes on carrier in interstate commerce an absolute duty to keep its locomotives free from defects and absolutely safe to operate; 'absolute duty' meaning one not subject to any limitation or condition, positive and not dependent, and unqualified by any considerations whatsoever."

That an appliance on an engine or cars under the Safety Appliance Law must absolutely function and that no amount of diligence in attempting to keep those parts in repair or working order will excuse the railway has been held in the Taylor case, 210 U. S. 281, and the C. B. & Q. case, 220 U. S. 559, and the Delk case, 220 U. S. 580.

In the case of Hines v. Smith, 275 Fed. 766, the engine was equipped with an automatic bell ringer which could be applied by the engineer, and the railroad contended that this automatic bell ringer was not a part and appurtenance of the locomotive. The action was brought by an employee who was

injured while crossing the tracks and his contention was that if the automatic bell ringer had been working and the bell ringing he would have been warned of the approach of the engine and would have escaped injury. The company was held liable because the automatic ringer would not work. The court held that the bell ringer was a part or appurtenance of the locomotive and tender within the meaning of this law, and the court said:

> "We have no hesitancy in saying that the hand operated bell cord cannot be accepted as a substitute for an automatic bell ringer. If the engine is equipped with an automatic ringer *which is out of repair,* we fail to see how some other means, not automatic, will meet the requirements of the statute."

It seems to us that the case just quoted is conclusive. The engine need not have been equipped with this automatic bell ringer. There was no contention that it was required. There was a rope by which the fireman could have rung the bell, but it had something extra on its engine. It gave a kind of super-touch to the safety side of the question by putting this automatic ringer on. Having put it on, it was its duty to see that the automatic ringer remained in repair. The defendant increased its duties and its own standard of safety by adding this superlative equipment.

In Kilburn v. Chicago, etc., Ry., 232 S. W. 1017, from Missouri, it was held that a broken piston rod resulting in the escape of a large quantity of steam into the cab of the locomotive is within the law as being a part and appurtenance of the locomotive.

In the case of Fredericks v. Erie R. Co., 36 Fed. (2) 716, the Circuit Court of Appeals of the Second Circuit held that a drain cock on the locomotive designed to be closed by hand was a part of the locomotive and that the railroad had the duty to see that the drain cock was fitted to the engine and maintained in such a way that application of manual force by

an employee in an attempt to close it would not pull it loose. The court, in the opinion in the Fredericks case just being quoted, said that the drain cock must be fitted to the engine and maintained in such a way that it would not pull loose in an attempt to close it; that it was to be expected that the employee would pull as hard as he thought necessary within the limit of his strength; that after trying to close it with one hand it was perfectly natural for the plaintiff to use both hands; that it was no excuse for the railroad to say that the servant was too strong and heavy for the job; that common knowledge establishes the fact that a pet cock constructed for the use which this one was constructed for can easily be made, fitted, and maintained in such a way that if the valve in it cannot be closed by hand, neither the drain cock nor the fitting will be broken loose by an attempt at manual closing, and this is so because the law requires appurtenances on the locomotive to be "in proper condition and safe to operate" and that for failure to comply with this law the railroad is liable without showing negligence.

In the case of S. A. L. v. D'Avignon, 41 Ga. App. 263 (in which certiorari was denied by the Supreme Court of the United States in 283 U. S. 827), it was held, as appears in the second headnote, that the things out of condition about that locomotive were the tank sill, the draw bar and the draw bar pin. The Court of Appeals held the duty to keep these appurtenances "in proper condition at all times and under all circumstances" was on the carrier and that it could not escape the duty by showing it had exercised reasonable care, and that contributory negligence by the injured employee is no defense, nor is assumption of the risk any defense.

(5)

GENERAL SUMMARY

The judge was abundantly fair to the railway company when he submitted to the jury the question of whether the watchman had become a part and appurtenance of the engine or whether it was a mere experiment. We have already quoted the master mechanic's uncontradicted evidence that it had been used from five to seven years on every passenger engine on this division of defendant's railway. Certainly the defendant cannot complain when this issue of fact was submitted to the jury. Certainly the judge was very cautious in submitting to the jury the question of whether the conditions existed in this case which should have caused the little watchman to function and whether its failure to function was due to the fact that it was not in proper condition, and in further submitting to the jury the further question of whether, had it operated, the train would have been stopped and the decedent's life have been saved.

The fact that this device may not have been in general use on other railroads is no defense to the defendant. The defendant is bound by the equipment which it placed on its own engine if it had one of an unusual type. It had elevated itself up to a standard of safety with this device on it which it was bound to maintain by keeping that device in proper condition. Employees who knew of that device on the engine could well claim that they accepted their positions knowing that that device was on the engine and relying upon it.

A standard of safety can be maintained by some instrument which prevents a dangerous condition from producing a fatal result. Indeed most safety appliances are to save human life against sudden dangerous conditions which develop.

To sum up,—we quote the following cases which apply to various parts of a locomotive, to-wit:

Any part of a locomotive is a part or an appurtenance there-

of, and the same has been held to apply in the D'Avignon case, 41 Ga. App. 263, to the tank sill, the draw bar, and the draw-bar pin on the tender of a locomotive; in Hines v. Smith, 275 Fed. 766, to an automatic bell ringer; in Wyatt v. N. Y., etc., R. R., 45 Fed. (2) 705 (4), to the failure to have a rear light on a locomotive; in the Beltz case, 10 Fed. (2) 74, to the driving rod on a locomotive which broke; in 36 Fed. (2) 716, a drain cock on a locomotive to be closed by hand maintained in such way that application of manual force by employee in an attempt to close it would not pull it loose.

In conclusion we say that the verdict in this case was very moderate, only $5,000.00 for the death of an engineer 59 years old, who earned more than that amount in two years' service.

We say that under a perfectly fair charge, submitting to the jury all the contentions of the defendant, that the jury found against the defendant. The Court of Appeals of Georgia, in a very able opinion, affirmed that judgment. The Supreme Court of Georgia, upon petition for certiorari to the Court of Appeals, declined to grant a certiorari.

We say that the defendant has had the full measure of its rights in respect to this very moderate verdict, and in concluding we refer the court to the charge of the court beginning on page 136 of the record and ending on page 154, and to the opinion of the Court of Appeals of Georgia beginning on page 155 of the record and ending on page 164.

Respectfully submitted,

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